Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

Judith E. Caldwell --PETITIONER

VS.

The United States of America --RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Judith E.Caldwell
Petitioner

3504 Geneva Circle
Address

Nashville, Tennessee 37209
City, State, Zip Code

615-320-7787
Phone

33 pp

QUESTIONS PRESENTED

1) Plaintiff, a physician , is currently without a license to practice and unable to obtain a license based on "prima facie" criteria as a result of adverse information submitted by Kenner Army Hospital to the National Practitioner Data Bank during spring of 1993 resulting in revocation of her license, without a hearing. Since then she has participated in two Court ordered hearings because the first hearing did not allow her access to evidence in her defense. After the second hearing, the hospital credential's committee reinstated her privileges conditionally which was not unlike the provisional (conditional) privileges she was offered when she was accepted for employment at their institution. However, with the offer of reinstatement of her privileges the hospital has not deleted the initial adverse report to the National Practitioner Data Bank.

FEDERAL QUESTION: Violation of Article 1, Section 9, Clause 3, 1st, 5th, 9th, and 13th Amendment of the U.S. Constitution; 42 U.S.C.§111ol, 42USC.§11111(Public Law 99-660.

2) The United States Court of Appeals has dismissed plaintiffs claims ot discrimination without allowing the introduction of evidence to present to the Court. Plaintiff contends she has been a victim of arbitrary policy implemented in an invidiously and disparately (discriminate) manner, perhaps gender and racially biased. She has been regarded as if she is impaired which resulted inan adverse decision in an effort to oppress and impede her work performance and productivity, not a good faith effort, but governed by will without regard to reason.

FEDERAL QUESTION: Civil Rights Act of 1964, et al., 42USC§11111;28USC§1343;Federal Torts Claim Acts 28USC§2679(b)(2)(A); Article III of the U.S. Constitution see Valley Forge Christian School v. Americans United, 454 U.S.464(1982);29USC794,794a,

3) Plaintiff because of her civilian status was not within the jurisdiction of the EEOC and EEO according to their officers. The Federal Tort Claims Act (F.T.C.A.) should apply based upon the Administrative Procedures Act and exceptions to exhaustion rule.

FEDERAL QUESTION: Violation of the 1st, 5th, 9th, and 13th Amendments of the U.S. Constitution, Administrative Procedure Act. See Abbot Laboratories v. Gardner, 387 U.S. 136(1967);Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667(1986); Mathews v. Eldridge, 424 U.S. 319 (1976);Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir.1984); Patsy v. Board of Regents, 454 U.S. 813(1982);Weinberger v. Salfi, 422 U.S. 749 (1975);Culpepper v. Reynolds Metals Company 421 F.2d 888.

4) The U.S. Court of Appeals has asked plaintiff to return to the hospital for a third hearing. She does not believe subjecting herself to double/triple jeopardy is beneficial. Also the hospital according to the plaintiff is not the forum in which to decide constitutional/civil rights violations.

FEDERAL QUESTION: 1st, 5th, 13th, 14th U.S. Constitutional Amendments, Human Rights Covenant 1966, Article 4, Section 2; Article 1, Section 9, Clause 3 of the U.S. Constitution.

5) Plaintiff was not an Independent Contractor and based upon interference with her medical judgments and diagnoses she should be entitled to suit or redress of grievances against defendants based upon the 1st, 5th, and the 13th Amendments of the U.S. Constitution, Article 4, Section2(U.S. Constitution), and the Human Rights Covenant of 1966.

FEDERAL QUESTION: 1st,5th, 9th, 13th, U.S. Constitutional Amendment,Article 4,Section 2 (plaintiff does not admit to but pleads innocence to charges). See Mac Donald v. U.S.A.807 F. Supp.775(1992);Wood v. Standard

QUESTIONS PRESENTED (cont.)

6) Fact: Plaintiff was not physically present at the oral argument held with the U.S. Court of Appeals on April 2, 1997. However, plaintiff always intended to bring this case to trial for civil rights violations. The First transcript in the U.S. District Court will show that the Court was told by plaintiff that she could not be sure about charges of discrimination unless she reviewed the medical records and other charges against her. See transcript of the U.S. District Court for the District of Columbia C.A. No. 94-1752,Jan. 9, 1995,Pg. 26, lines 2-11. The Court proceeded to dismiss without prejudice plaintiff's civil rights claims under the Civil Rights Act of 1964 Title VII. Later after viewing additional documents at Kenner, October 1995, it was determined by plaintiff that the charges against plaintiff were arbitrary and discriminatory. The Court was asked to place a protective order on these documents or release the documents in the plaintiff's and/or courts possession. The Court did not grant discovery or schedule for trial. And the Court is asking why has this case been on the dockets so long...? Before this case was dismissed with prejudice plaintiff again alerted the judge to discriminatory deeds at Kenner. This alert occurred on November 14, 1995. See U.S.District Court for the District of Columbia transcript, C.A. No. 94-1752;Nov. 14, 1995,Page 16-17, lines 11-25,lines1-8, respectively.

To be charged with deeds of an infamous nature, plaintiff is owed her "day in court," to attempt to clear her name. How can she prove to the court that the defendants claims are a pretext without evidence and a trial before an impartial jury. Truly justice delayed is justice denied! If granted a trial and she successfully pleads her case she seeks damages. FEDERAL QUESTION: Title VII Civil Rights Act 1964;Constitutional Amendments 1st,4th, 5th, 9th, 13th, Article I, Section 9, Clause 3; See McDonnell Douglas Corp., v.Green, 411 U.S. 792,93 S.Ct. 1817(1973); Texas Department of Community Affairs v.Burdine, 450 U.S. 248, 101, S.Ct. 1089; See Wintz v. Port Authority of New York and New Jersey 551 F. Supp. 1324 (1982);Piphus v. Carey

QUESTIONS PRESENTED (cont.)

545 F. 2d 30 (1976)

7) The defendants are claiming immunity based on the F.T.C.A. 28 U.S.C.§§2680 et. seq. Defendants are not given the right to obstruct Civil Rights/Constitutional Rights. Therefore , the F.T.C.A. should be applicable in this case.

FEDERAL QUESTION: Application of F.T.C.A. 28U.S.C.§2680 and Exhaustion Rules as applied to the Constitution. No immunity upon violation of Civil Rights and Constitutional Rights.

LIST OF PARTIES

Petitioner: Judith E. Caldwell

Respondent:1 Donna Shalala, in her Official Capacity as Secretary of Health and Human Services

2 The Department of the Army

3 The United States of America

4 Kenner Army Community Hospital

5 Credential's Committee of Kenner Army Hospital Fall 1992/ Spring 1995 Official/Unofficial Capacity

6 Charles M. Ellis, Jr., Col., MC., CDR Official/Unofficial Capacity

7 Joel T. Fishbain, M.D. Official/Unofficial Capacity

8 Cornwell B. Leinbach, Col.,MC.,DCCS Official/Unofficial Capacity

9) David W. Schroeder, CPT.,MC.,Chief Official/Unofficial Capacity

TABLE OF AUTHORITIES CITED

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Discrimination-	
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Texas Department of Community Affairsv Burdine,450U.S.248,252-253,101S.Ct.1089, 1093-1094	
Wintz v. Port Authority of New York and New Jersey55lF.Supp1324(1982)	
Hazelwood School District v. U.S.433US299, 97 S. Ct.2736	
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Gertzv.Robert Welch, Inc. 418US323,94S.Ct., 2999	
Milkovich v. Lorain Journal Co.,110S. Ct.2704, 2705(1990)	
United States v. Brown 381 U.S.440	
Meritor Savings Bank,FSBv. Vinson477U.S. , 57,106S.Ct.2399	
Philadelphia Newspapers, Inc. v.Hepps 475 U.S.780	
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APPENDIX B

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and:

has been disignated for publication but is not yet reported

The opinion of the United States District Court appears at Appendix B to the petition and:

publication status not known

BASIS FOR JURISDICTION IN SUPREME COURT FOR THE UNITED STATES OF AMERICA

Date judgment/order sought to be reviewed was entered:

U.S. Court of Appeals judgment entered May 27,1997

Date U.S. District Court for the District of Columbia entered judgment:

March 15, 1996

Date of any order respecting rehearing/rehearing In Banc:

Denied rehearing/rehearing In Banc on August 8, 1997

Statutory provision conferring Supreme Court jurisdiction to review on Writ of Certiorari:

28 U.S.C.§1254
28 U.S.C.§1253

Notifications required by rule 29.4(b) or (c) have been made to the following agencies or individuals: (certified mail)

Office of the Staff Judge Advocate
Claims Section
441 First Street
Ft. Lee, Virginia 23801-1507

Secretary of the Army
101 Army Pentagon
Washington, DC 20310-0101

Notifications required by rule 29.4(b) or (c) continued:

Mr. Mark Nebeker, Esquire
Assistant United States Attorney
U.S. Department of Justice;Room 10-830
555 Fourth Street, N.W.
Washington, DC 20001

Solicitor General of the United States
Department of Justice; Room 5614
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

Office of General Counsel
Department of Health and Human Services
Room 700 E (HHH Building)
200 Independence Ave. S.W.
Washington, DC 20201

CONSTITUTIONAL AND STATUTORY PROVISIONS

1)Constitutional Amendments	Page No.
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CONCISE STATEMENT OF THE CASE

Basis for jurisdiction in the U.S.District Court: 28U.S.C. §§1331, 1332, 1343, 1367

For cases and other related authorities see Table of Cited Authorities....

In October, 1992, plaintiff worked for Kenner hospital as a physician. The contract she received offered her provisional (conditional) privileges. After approximately eleven or twelve days she was terminated without a hearing. Subsequent U.S. District Court ordered hearings resulted in a statement from hospital officials stating the initial adverse action was unwarranted. The hospital officials subsequently reinstated her privileges under the conditions that chart review would occur. Chart reviews are matters of quality assurance and are conducted throughout hospitals.

During a court ordered hearing, plaintiff's suspicions of discriminatory treatment were heightened. Thru writings and transcripts this was conveyed to the Court. Plaintiff sought to reopen the case for discovery/trial. The court dismissed the case with prejudice. The U.S. Court of Appeals also dismissed her claims of discrimination .

On appeal to the U.S. Court of Appeals plaintiff at no time was seeking rehearing with Kenner hospital. Plaintiff was and presently is seeking discovery/trial with a court appointed trier of fact with a preponderance of evidence. Plaintiff believes defendants have presented their case based on pretext. A reinstatement of plaintiff's privileges without the ability to obtain a license is of no benefit to plaintiff.

Plaintiff is being held to answer for an infamous deed without the benefits of trial.(Violation of 1st,5th, and 13th U.S. Constitutional Amendments; Article 1, Section 9,

Clause 3.) In March of 1996 plaintiff motioned the court to reopen the case with a supplemental pleading to enter violation of the 1st Amendment of the Constitution as an additional cause of action.

The defendants are pleading immunity based upon F.T.C.A.28U.S.C.§§2680et seq. The defendants have been granted the right to arbitrarily attack plaintiff's person,(i.e. mind, body, spirit) which violates the 1st, 5th, 9th, and 13th Constitutional Amendments, as far as no trial is concerned, as well as Article 1, Section 9, Clause 3, and Article 4 of the United States Constitution, and the Human Rights Covenant of 1966.

Plaintiff has passed standardized exams as a resident and again when she obtained a license to practice medicine. At the time she began working for Kenner, she was a competent physician. She still is. The burden of proof lies with the plaintiff and she has not been allowed the opportunity to plead her case before a trier of fact with a preponderance of evidence. See St. Mary's Honor Center v. Hicks 113 S Ct. 2748.

Plaintiff asserts she was not an independent contractor. Also her ineligibility to get assistance of EEOC and EEO was not within her control. Exhaustion rules as related to the Administrative Procedure Act and the F.T.C.A. should apply to plaintiff. See Table of Cited Authorities. Therefore she believes her case should be remanded for trial so she can dispute the pretext upon which she has been convicted without a trial.

Reasons Relied on for Allowance of the Writ (See Rule 10)

According to Rules of the Supreme Court of the United States of America Rule 10, plaintiff believes that Rule l0(a)... "departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;" and Rule l0 (c) "a state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court," generally applies to her case.

It is plaintiff's belief that cases based upon discriminatory issues are handled differently from the way her case has been decided. A recent U.S. District Court case in Tennessee, June l9, l997, Nagarajan vs. TSU was decided upon records,employment data , etc. allowed as evidence. No evidence has been allowed admittance to these courts on behalf of plaintiff. However, highly inflammatory opinions of the respondents has been accepted as the truth . These opinions have originated from individuals who have performed in the capacity of judge, juror, and executioner. Clearly this is not in the best interest of the plaintiff. See United States v. Brown 381 U.S. 437, 443,447.

Plaintiff wants an opportunity to plead before the Court with appropriate evidence that she is a victim of invidiously disparate treatment and/or a plot to submit her to the will of arbitrarily opinionated individuals. Due process with Kenner Hospital has been exercised and plaintiff accepts their offer of reinstatement of her privileges secondary to the initial charges being unwarranted, as decided by Kenner Hospital officials.

However, Kenner Hospital continues to publish adverse information pertaining to plaintiff that subjects her to humanly inflicted scorn and censorship without the benefit

of trial by Court. Consequently she is unable to obtain a license to practice her profession. Kenner hospital is not a court of law which adjudicates issues related to civil and constitutional rights violations. Therefore, plaintiff asks the Supreme Court to adjudicate these federal questions of law based upon Rule l0 of the Supreme Court .

No. _____

_____

IN THE

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

_____

Judith E. Caldwell --Petitioner

vs.

The United States of America--Respondents

PROOF OF SERVICE

I, Judith E. Caldwell, do declare that on this date, August 23,1997, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR A WRIT OF CERTIORARI on every other agency or person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them with first-class postage prepaid.

The names and addresses of those served are as follows:
Office of the Staff Judge Advocate
Claims Section
441 First Street
Ft. Lee, Virginia 23801-1507

Secretary of the Army
101 Army Pentagon
Washington, DC 20310-0101

PROOF OF SERVICE(cont.)

The names and addresses of those served are as follows:

Department of the Army
U.S. Army Claims Service
Office of the Judge Advocate General
Fort George G. Meade, Maryland 20755-5360

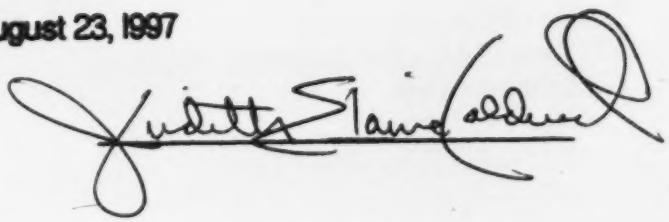
Mr. Mark Nebeker, Esquire
Assistant United States Attorney
U.S. Department of Justice;Room 10-830
555 Fourth Street, N.W.
Washingto , DC 20001

Solicitor General of the United States
Department of Justice; Room 5614
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

Office of General Counsel
Department of Health and Human Services
Room 700 E (HHH Building)
200 Independence Ave. S.W.
Washington, DC 20201

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 23, 1997



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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Argued April 2, 1997 Decided May 27, 1997

No. 96-5112

Judith E. Caldwell, M.D.
Appellant

v.

Donna E. Shalala, In Her Official Capacity as
Secretary of Health and Human Services, et al.,
Appellees

Consolidated With
No. 96-5143

Appeals from the United States District Court
for the District of Columbia
(No.94cv01752)

Stephanos Bibas, appointed by the court as amicus curiae, argued the cause on the side of appellant, with whom Jeffrey G. Huvelle was on the briefs. Judith E. Caldwell , appearing pro se, also filed briefs.

W. Mark Nebeker, Assistant U.S. Attorney, argued the cause for appellees, with whom Eric H. Holder, Jr., U.S. Attorney, John D. Bates and R. Craig Lawrence, Assistant U.S. Attorneys, were on the brief.

Before: Edwards, Chief Judge, Wald and Randolph, Circuit Judges.

Opinion for the Court filed by Chief Judge Edwards.

Edwards, Chief Judge: Appellant Judith Caldwell is a medical doctor who briefly worked at the Kenner Army Community Hospital ("Kenner"). Shortly after she began, Kenner revoked her clinical privileges due to alleged negligence. This revocation led to an "adverse action report" in the National Practitioner Data Bank ("Data Bank"), a national clearinghouse of information about doctors, see 42 U.S.C. §§ 11101-11152(1994); 42 C.F.R. §§ 60.1-.14 (1996).

Caldwell filed suit, arguing, inter alia, that Kenner failed to comply with procedural due process before revoking her privileges. The District Court agreed and ordered a due process hearing; because it was not convinced that the first hearing was adequate, it then ordered a supplemental hearing. After the supplemental hearing, Kenner concluded that the revocation of Caldwell's privileges had been "unwarranted," and conditionally reinstated her privileges. Caldwell argued that the supplemental hearing was inadequate, but the District Court did not rule on this issue, as it believed that the conditional reinstatement would enable Caldwell to practice medicine again, thus mooting

her claim.

Caldwell, however, has been unable to practice medicine. Her problems persist because the new Data Bank entry was only a "conditional reinstatement," and did not void the original negligence entry (as it could have). Thus, although Kenner has concluded that the original action was "unwarranted," Caldwell has been unable to practice medicine due to the original and remaining blight on her record. Caldwell claims that if she had had full use of the relevant medical records at the supplemental hearing, she may have been able to convince Kenner to expunge the the original "revocation" from the Data Bank records, and change the "conditional reinstatement" to something akin to an "instatement of privileges, subject to normal conditions."

There was no transcript of the supplemental hearing, and appellate counsel could not explain what had happened at the hearing. Because the District court did not address the constitutional adequacy of the supplemental hearing, the case must be remanded for a determination of whether Caldwell had an opportunity to make full use of all relevant medical records at the supplemental hearing. If it determines that the hearing was inadequate, the District Court must order Kenner to conduct a new hearing (unless Kenner is willing to revise the Data Bank entries without further hearing). Accordingly, we reverse and remand.

.I. BACKGROUND

A. The Revocation of Privileges and the Adverse Action

Caldwell, a black woman, was employed as a physician with Coastal Government Services, Inc., a private company under contract with the United States Department of the Army. Caldwell was assigned to Kenner, an Army Hospital, and Kenner granted Caldwell clinical privileges at its facility. Caldwell worked at Kenner for only

eleven days--from October 28, 1992 until November 12, 1992.

In early November 1992, shortly after Caldwell commenced working at Kenner, Dr. Joel Fishbein wrote a memorandum for the record in which he stated that he had observed deficiencies in Caldwell's competence. On November 13, 1992, Caldwell received notice from Kenner's Credentials Committee that her clinical privileges were being placed in abeyance for fourteen days while the allegations against her were investigated.

On December 2, 1992, the Credentials Committee wrote a letter to Caldwell informing her that her clinical privileges at Kenner were being revoked and that she had a right to a hearing. This letter, however, never reached her. On January 7, 1993, the Credentials Committee forwarded a report of the revocation of Caldwell's clinical privileges to the Office of the Army Surgeon General.

On July 22, 1993, the Army filed an adverse action report with the Data Bank, which stated that Caldwell's privileges had been revoked due to negligence. In November 1993, as a result of the adverse action report, the South Carolina board of medicine denied Caldwell's application for a permanent license to practice medicine. In February 1994, the Mississippi and Alabama Boards of Medicine denied applications for medical licenses for the same reason. Finally, in the summer of 1994, Caldwell lost her medical licenses in California and Virginia because of the adverse action report.

B. The Court Proceedings and the Conditional Reinstatement

On August 11, 1994, Caldwell filed suit, asserting claims under, inter alia, the Due Process Clause, Title VII of the Civil Rights Act, and 42U.S.C.§1981(1994). The District Court dismissed Caldwell's discrimination claims, but remanded her due process claim, ordering Kenner to conduct a due process hearing.

On March 20, 1995, an Ad Hoc Credentials Committee at Kenner held a hearing to give Caldwell the due process required by the District Court. The committee concluded that Caldwell had provided substandard documentation of care. Caldwell filed a motion with the District Court to reopen the case, claiming that she had not been able to examine the full medical records or cross examine witnesses at the first hearing. Because the District Court was not convinced that the first hearing satisfied the requirements of due process, it ordered that Kenner give Caldwell a supplemental due process hearing to correct the alleged deficiencies.

Another Ad Hoc Credentials Hearing Committee met on September 26, 1995. After the hearing, the Commanding Officer at Kenner informed Caldwell that the revocation of her privileges has been "unwarranted." He reinstated her privileges with two conditions: 100% concurrent chart review for the first three months or 750 charts, and monthly performance review by the Credentials Committee.

On November 13, 1995, the Army forwarded a revised information report to the Data Bank. The report showed that Kenner had revised its earlier action, but it did not void the original entry in the Data Bank (as it could have). The report stated that Caldwell's privileges were conditionally reinstated, subject to the two conditions.

The following day, the District Court held a scheduling conference. Caldwell argued that the supplemental hearing was inadequate. The Army could not fully answer this charge, as the attorney who had attended the supplemental hearing was unexpectedly absent (his wife was giving birth that morning). The District Court did not rule on the adequacy of the supplemental hearing, however, as it believed that the conditional reinstatement of Caldwell's privileges would enable her to practice medicine again. See, e.g., Caldwell v. Shalala, Civ. No.94-1752, at 18 (D.D.C. Nov. 14, 1995)(Status Call) ("It looks like you are on the road to getting your license privileges back.", 19("I think that you will be able to get on with your life, once you get your National Practitioner Data Bank records straightened

out."), reprinted in Appendix ("App.") D at 18-19. The District Court dismissed the case without prejudice, subject to reopening upon oral application by either party.

Caldwell later notified the District Court that the state medical boards had not reinstated her licenses. She then moved to reopen the case, but the District Court denied the motion as moot. The trial court then ordered that the case be dismissed with prejudice.

II. ANALYSIS

This case presents a straightforward request for procedural due process.[1] Caldwell asserts that she did not have an opportunity to make full use of relevant medical records at the supplemental hearing. The District Court did not rule on this issue, because it erroneously believed that Caldwell's conditional reinstatement would allow her to practice medicine again, thus mooting her procedural due process claim. See, e.g., Caldwell v. Shalala, Civ. No. 94-1752, at 18 (D.D.C. Nov. 14, 1995) (Status Call) ("It looks like you are on the road to getting your license privileges back."), 19 ("I think that you will be able to get on with your life, once you get your National Practitioner Data Bank records straightened out."), reprinted in App. D at 18-19.

Caldwell claims that, because her Data Bank records still show that her clinical privileges were "revoked" and that her privileges have only been "conditionally reinstated," state licensing boards have been unwilling to reinstate her medical licenses. She claims that, had she been able to explore fully the evidence at the supplemental hearing, she may have been able to convince Kenner to expunge the record reference to a " conditional reinstatement."

---

1 We find no merit in Caldwell's argument that the District Court erred in dismissing her discrimination claims. Likewise we reject her claim for damages under Bivens v. Six Unknown Named Agents of Fed. Bureauof Narcotics, 403 U.S. 388 (1971). Finally lest there be any confusion over what is at issue here, we note that Caldwell has not raised any substantive due process claim.

There was no transcript of the supplemental hearing, and appellate counsel could not explain what happened at the hearing. Because the District Court did not rule on the adequacy of the supplemental hearing, the case must be remanded for a determination of whether Caldwell had an opportunity to make full use of all relevant medical records at the supplemental hearing. If it determines that the hearing was inadequate, the District Court must order Kenner to conduct a new hearing (unless, of course, Kenner is willing to revise the Data entries without further hearing).

We find it perplexing that, even though Kenner concluded that the original action taken against Caldwell was "unwarranted," the mark remains on her record. If the original action was unwarranted, then Caldwell should be in no worse position than she started--i.e., with a clean record in the Data Bank. Furthermore, we fail to see why this case has floundered in litigation for these many years. It is undisputed that the Army has the power to void the original action; the Army's failure to give full redress is inexplicable in light of the determination that the original mark against Caldwell was unwarranted. We trust that the parties will promptly resolve this case and remove it from the court's dockets.

III. CONCLUSION

For the foregoing reasons, we reverse the judgment of the District Court, and remand for a determination of whether Caldwell had an opportunity to make full use of all relevant medical records at the supplemental hearing.

Appendix A

United States Court of Appeals

For the District of Columbia

No. 96-5112 September Term, 1996

Judith E. Caldwell,
Appellant

FILED
AUG 8, 1997

v.

Donna E. Shalala, in her official capacity as
Secretary of Health and Human Services, et al.,
Appellees

Consolidated with 96-5143

BEFORE: Edwards, Chief Judge, Wald and Randolph, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed July 8, 1997, it is ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

"s/Robert A. Bonner"

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Judith E. Caldwell,
Plaintiff,

v.

Civil No.94-1752(CRR)

Donna Shalala, Secretary of Health and Human Service, et al.,

Defendants

FILED

January 9, 1995

Clerk U.S.District Court
District of Columbia

ORDER

On August 11, 1994, the Plaintiff filed a Complaint alleging, inter alia, various claims under the Federal Tort Claims Act, Title VII of the Civil Rights Act, and the Due Process Clause of the Fifth Amendment. On October 11, 1994, the Defendants responded to the Court's show cause Order by requesting that the Court dismiss the case.[1] The Plaintiff subsequently filed a response and a document entitled "Amended Pleadings, " to which the Government has filed a response thereto. On January 9, 1995, the Court held a Hearing in the above-captioned case.

In view of the pleadings, the applicable law, and the Hearing held today, the Court shall grant the Defendant's Motion for Summary Judgment, in part.

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[1] Since the Defendant's Motion relies on matters outside the pleadings, the Court shall treat it as a Motion for Summary Judgment. See Fed. R. Civ. Pro. 12(b).

I. BACKGROUND

Plaintiff was employed as a physician with Coastal Government Services, Inc. ("CGS"), a private company under contract with the United States Department of the Army. See (Comp. at 4.) Pursuant to its contract with CGS, the Kenner Army Community Hospital granted the Plaintiff clinical privileges at its facility. Id. Plaintiff was employed at Kenner from October 28, 1992, until November 12, 1992. In early November of 1992, Dr. Joel Fishbein wrote a memorandum for the record in which he expressed that he had observed deficiencies in Plaintiff's competence. Id. On November 13, 1992, Plaintiff received notice from Kenner's Credentials Committee of the Office of Quality Improvement ("Credentials Committee") that her clinical privileges were being placed in abeyance for fourteen (14) days while the allegations against her of misdiagnosis and mismanagement of patients were investigated. (Letter from Chairperson of the Credentials Committee to Dr. Judith E. Caldwell (November 13, 1992). On November 26, 1992, Plaintiff resigned from CGS upon condition that she is not reinstated. See (Resignation Letter of Dr. Judith Caldwell dated November 26, 1992.)

On December 2, 1992, the Credentials Committee wrote a letter to the Plaintiff informing her that her clinical privileges at Kenner were being revoked. (Letter from Chairperson of the Credentials Committee to Dr. Judith E. Caldwell (December 2, 1992). However, the letter was returned after unsuccessful attempts at delivery.. (Decl. of Sharon N. Norton ¶ 4.)

On or about December 29, 1992, the Credentials Committee tried, unsuccessfully, to contact the Plaintiff by telephone regarding her right to a hearing. Id. at 4. Subsequently, on December 30, 1992, the Credentials committee met and voted to forward a report of the revocation of Plaintiff's clinical privileges to the Office of the Surgeon General. On January 7, 1993, the letter and the report were forwarded. Id. On March 9, 1993, the Credentials Committee again tried to telephone the Plaintiff at two different locations but was unsuccessful. Id. The

Credentials Committee then mailed a second notification of hearing letter, but the letter was returned unopened on April 15, 1993 after three unsuccessful attempts at delivery.

On July 22, 1993, an adverse action report on the Plaintiff was filed with the National Practitioner Data Bank with respect to the revocation of Plaintiff's license. Due to the report, the Plaintiff has had her license to practice medicine effectively revoked. On August 11, 1994, Plaintiff filed the instant lawsuit asking for relief under, inter alia, the Federal Tort Claims Act, Title VII of the Civil Rights Act, and the Fifth Amendment of the Constitution.

II. DISCUSSION

A. PLAINTIFF'S CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT SHALL BE DISMISSED BECAUSE SHE HAS FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES.

Section 2675 (a) of the Federal Tort Claims Act provides that: "An action shall not be instituted upon a claim...caused by the negligent or wrongful act or omission of any employee of the Government while actiong within the scope of his office, unless the claimant shall have first presented the claim tothe appropriate Federal agency and his claim shall have been finally denied by the agency.

28 U.S.C.§2675. In this case, the Plaintiff's Federal Tort Claims Act claims must be dismissed.

On August 11, 1994, the Plaintiff filed the instant case alleging a cause of action under the Federal Tort Claims Act. In her "Amended Pleadings," filed on November 10, 1994, Plaintiff asserts that on November 3, 1994, she filed an administrative claim. Since that administrative claim was filed after the instant case, and there has not been a final decision, the Plaintiff's claim must be dismissed for failing to properly exhaust her administrative remedies. See 28 U.S.C.§2675.

B. PLAINTIFF'S TITLE VII CLAIMS SHALL BE DISSMISSED BECAUSE SHE ADMITTED THAT SHE WAS NOT RACIALLY OR SEXUALLY DISCRIMINATED AGAINST.

In her Complaint, the Plaintiff alleged a violation of Title VII of the Civil Rights Act. However, during the Hearing held before the Court on January 9, 1995, the Plaintiff, in describing her Complaint, admitted that there is no basis for a finding of race or sex based discrimination. Thus, the Court shall dismiss her Title VII claim.

C. PLAINTIFF'S DUE PROCESS CLAIM SHALL BE REMANDED TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES.

Under the Due Process Clause of the Constitution, an individual may not be deprived of "life, liberty, or property without due process of law." U.S. Const. Amend. 5. In this case, the court finds that Plaintiff's Due Process claim must be remanded to the Agency in the interest of justice.

On December 2, 1992, Kenner Army Hospital's Credentials Committee, without the Plaintiff's presence, voted to suspend her medical license. The report of her revocation was then forwarded to the Office of the Surgeon General, who forwarded it to the National Practitioner Data Bank. As a consequence of the filing of the report with the National Practitioner Data Bank, the Plaintiff has been effectively divested of her license to practice medicine. Accordingly, the Court shall remand this claim to the Department of Health and Human Services.

This remand Order is being done in order to satisfy the requirements of fundamental fairness, since to date the Plaintiff has allegedly not had a full and complete opportunity to have a Due Process Hearing with respect to the loss of her medical license. However, this is not a determination of the merits one way or the other as to how the Agency

should ultimately decide the issue, and is only intended to see to it that the Agency makes a determination based upon notice and an opportunity to be heard, and to allow the Plaintiff the opportunity to engage in cross examination of potentially adverse witnesses with the presence of Counsel, if she so chooses.

Based on the foregoing, it is, by the Court, this 9th day of January, 1995,

ORDERED that the Defendant's Motion for Summary Judgment shall be, and hereby is, granted, in part, and denied, in part, in accordance with the following Ordered paragraphs; and it is

FURTHER ORDERED that the Plaintiff's Federal Tort Claims Act claims shall be, and hereby is, dismissed; and it is

FURTHER ORDERED that the Plaintiff's Due Process claims shall be, and hereby is, remanded to the Defendant Agency , with instructions that it contact the Secretary of the Army, its agents, servants, and employees, to provide the Plaintiff with a Due Process Hearing as to whether the claims against her were false which led to the effective divestiture of her license to practice medicine. The Hearing shall afford the Plaintiff an opportunity to engage in cross examination of potentially adverse witnesses and the presence of Counsel, if she chooses. Said Hearing shall be concluded on or before 4:00 P.M. on April 10, 1995; and it is

FURTHER ORDERED that the above-entitled action shall be, and hereby is, dismissed, without prejudice, from the dockets of this Court; and that any of the parties may reopen this case under the above condition may do so upon oral application to the Courtroom Deputy, Ms. Debra White (202) 273-0553); absent such a request to reopen this case on or before April 18, 1995, the above -entitled case shall stand dismissed, with prejudice; and it is

FURTHER ORDERED that all outstanding Motions are hereby declared moot.

"s/Charles R. Richey"
United States District Judge

FURTHER ORDERED that the plaintiff's Motion to Re-Open and Motion to Substitute the United States as a Defendant in this Case shall be DENIED as moot.

"s/Charles R. Richey
United States District Judge

APPENDIX B